SUPREME COURT, U.S.

Supreme Court, U.S.
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G. ROBERT SEAVER

SUPREME COURT OF THE UNITED STATES

October term, 1970

No. 1 2 5 1

SOUTHLAND INCORPORATED
Petitioner in Certiorari

v.

COX ENTERPRISES INC. AND ATLANTA NEWSPAPERS INC.
Respondents in Certiorari

REPLY BRIEF OF PETITIONER SOUTHLAND INCORPORATED IN REBUTTAL OF BRIEF OF RESPONDENTS COX ENTERPRISES INC. AND ATLANTA NEWSPAPERS INC. AND IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

G. Seals Aiken
Attorney for Petitioner
1409-10 Candler Building
Atlanta, Georgia 30303

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OPINIONS BELOW

The opinions below and the orders of the trial court are included in Petitioner's Appendix in a separate volume and opinions of the appellate court are reported at 226 Ga. 794, 177 SE 2d 653; and 226 Ga. 798, 177 SE 2d 655.

JURISDICTION

Federal Constitutional questions were timely and properly raised in the trial court and repeated and insisted upon in the Supreme Court of Georgia.

REBUTTAL OF QUESTIONS PRESENTED

I. The petition shows (verified by the record) that Federal questions were timely and properly raised in the trial court and repeated and insisted upon in the Supreme Court of Georgia.

Petitioner listed 110 errors in its enumeration of errors, many of them Federal Constitutional Questions. Some of them were formally designated as Federal Constitutional questions.

II. Respondents have incorrectly presented the issues.

(a) The question here is whether dual jurisdiction over appeals after docketing in the higher court is Constitutional where such dual jurisdiction deprives petitioner of its Constitutional right to a review before the state's highest tribunal, and es-

pecially where the uncontroverted evidence is that the delay in filing of the transcript was caused by the negligence of the official reporter of the trial court when he "lost" all the documentary evidence and especially where the judgment of the trial court that the delay was caused by petitioner was arbitrary and capricious and deprived petitioner of its property without due process of law in violation of Section I of Amendment XIV of the U. S. Constitution.

RESPONDENTS OFFERED MANY UNFOUNDED EXPLANATIONS FOR THE DELAY IN THE APPEAL, ALL OF THEM INTENDED TO BLAME PETITIONER UNJUSTLY FOR THE DELAY

(b) The question here is whether a court reporter's "loss" of the evidence can be said to be caused by petitioner when the petitioner had no custody or control over the evidence and had nothing to gain by such a loss, whereas respondents were given sufficient time to complete the building sought to be enjoined and were arbitrarily and capriciously given an excuse justifying respondents in continuing con-

struction of the building and an excuse to claim the delay in the appeal was caused by petitioner.

REBUTTAL OF SUMMARY OF ARGUMENT

I. The petition is replete from end to end with contention that the Supreme Court of Georgia decided not a single issue of law, but evaded the issues by erroneously and unconstitutionally holding that the appeal was "stale".

II. The petition lists 25 principles of Constitutional law, some of them multiple subjects, all based on the Federal Constitution which this honorable Court knows is the supreme federal law, on which petitioner relies for allowance of writ of certiorari.

III. The reasons for granting the Writ of Certiorari are impelling and require a review by this Court according to its prior decisions cited by petitioner.

IV. (A) Respondents refer to "the question" sought to be raised. The petition enumerates not "the question", but 15 questions of Constitutional

Federal law, all of which are supported by argument and authorities, which petitioner presents for review.

(B) Since it made no decision on mootness, it may be assumed that the Supreme Court of Georgia agreed with petitioner that an obstruction in a street cannot become moot.

REBUTTAL OF ARGUMENT

I.

THE SUPREME COURT OF GEORGIA DECIDED NO SINGLE ISSUE OF GEORGIA LAW, BUT EVADED ALL ISSUES, INCLUDING CONSTITUTIONAL ISSUES, BY THE ILLEGAL AND UNCONSTITUTIONAL DEVICE OF HOLDING THAT A LATER CASE "CONTROLLED"

GEORGIA SUPREME COURT DELAYED DECISION ON PETITIONER'S APPEAL THREE MONTHS UNTIL RESPONDENTS FILED THEIR COUNTER APPEAL, THEN QUICKLY DECIDED THE COUNTER APPEAL CONTROLLED THE EARLIER APPEAL IN VIOLATION OF EQUAL JUSTICE AND RETROACTIVE LAW PROVISIONS.

It was impossible for counsel for petitioner to anticipate that the Supreme Court of Georgia would withhold decision on its appeal for three months

during which respondents could file their counter appeal and be given a decision illegally and unconstitutionally holding that the latter appeal controlled the earlier appeal in violation of federal Constitutional provisions forbidding retroactive law and unequal treatment under the law.

Constitutional provisions on retroactive law are discussed in petitioner's Appendix page 15.

For authorities on controlling cases see Appendix of petitioner Pages 12, 13, 14.

RESPONDENTS REMAINED SILENT FOR 12 MONTHS UNTIL THE MISSING EVIDENCE WAS FOUND, THEN RAISED THE ISSUE OF A "STALE" APPEAL

It was impossible for counsel for petitioner to anticipate that the Supreme Court of Georgia would uphold respondents in their contention that they had not waived any right to contend that the appeal was not filed timely by waiting approximately twelve months before raising such an issue despite the fact that petitioner secured several extensions

of time with notice each time to respondents in which to file the transcript on appeal in its effort to have the trial court's official reporter locate the necessary documentary evidence in his custody and control and no objections whatever were made by respondents to any of said orders of extension.

See trial court's observation on this point in petitioner's Appendix top page 41. Extension orders: petitioner's Appendix pages 37, 38.

FINDING OF A "STALE" APPEAL WAS BASED ON SELF-CONTRADICTORY, EQUIVOCAL AND EVASIVE TESTIMONY OF THE TRIAL COURT'S REPORTER, TESTIMONY SUCH AS GEORGIA LAW FROWNS UPON

The findings of the trial court and of the appellate court that the appeal of petitioner was "stale" were based solely on the self-contradictory, vague and equivocal testimony of the official reporter of the trial court (R22,23) in which the reporter finally admitted under cross examination that he "misplaced" all the documentary evidence and did not "find" it

until a year later, three weeks before the appeal was docketed in the Supreme Court of Georgia.

The reporter testified that he "found" the evidence (258 pages) in a cabinet in an anteroom of the trial court.

The reporter's "loss" of the evidence conveniently gave the respondents the time they needed to complete construction of the building which it was sought to enjoin and a convenient excuse to raise the issue of a "stale" appeal.

When such actions deprive petitioner of its Constitutional right to review in the state's highest tribunal, this Court is impelled to correct the situation.

Direct and positive testimony such as that offered by petitioner (R45 Paragraphs 3, 4) is given preference by Ga. Code 38-111 over vague, self-contradictory, evasive and equivocal testimony such as that of the trial court's official reporter. (R22,23)

II.

FEDERAL CONSTITUTIONAL QUESTIONS WERE TIMELY, PROPERLY AND FORMALLY RAISED AND INSISTED UPON IN THE TRIAL COURT AND ON APPEAL IN THE SUPREME COURT OF GEORGIA

While more than 25 violations of the Federal Constitution in the trial court and the appellate court are alleged by petitioner, its principal injuries are:

1. It has been deprived of its Constitutional right to a review by the state's highest court.

2. It has been deprived of principal access to its place of business over the public streets without due process.

Federal Constitutional questions raised timely and properly in the trial court were of two types: (1) those raised formally and designated as constitutional questions; and (2) those raised informally and not specifically labeled as constitutional questions.

Principal question formally raised in the trial

court was that of dual jurisdiction of Georgia courts where this dual jurisdiction deprived petitioner of its constitutional right to a review of its case in the state's highest tribunal.

At R26 paragraph 2 counsel for petitioner is shown arguing that there are grave constitutional questions involved. He was overruled by the trial court.

At R31 counsel for petitioner pleads for the trial court to allow one week for study and consideration of the constitutional questions involved.

TRIAL COURT HAD NO TIME FOR CONSTITUTIONAL DEBATE

The trial court (bottom of R31) announced it would withhold decision a few days to permit presentation of briefs, but would allow no time for constitutional debate.

Whereupon petitioner presented its brief (R33,43) within the time allowed and orally urged upon the court that any judgment holding that the delay in the appeal was caused by plaintiff would

be in spite of uncontroverted evidence that the plaintiff was in no way responsible for the delay and would deprive plaintiff of its property without due process and would deprive it of equal treatment under the law.

TRIAL COURT REFUSED PETITIONER OPPORTUNITY TO ARGUE CONSTITUTIONAL QUESTIONS

The trial court's decision (petitioner's appendix, page 40) was in effect a denial of petitioner's constitutional plea.

If the trial court read petitioner's brief, it obviously gave the brief (R33,43) no weight.

At R27 counsel for petitioner raised informally the constitutional question of equal justice, when the trial court appeared to be impressed by testimony that the respondents were spending $1,000,000 per month.

Pertinent to this question is a holding of this Court in Smith v. Bennett 365 US 708; 81 S. Ct 895; 6 L ed 2d 39:

"There can be no equal justice when the kind of trial a man gets depends on the amount of money he has".

Petitioner prays that this Court will rule not only on the Constitutional questions formally raised but also on those raised informally. Petitioner also prays this Court will rule on the violations of the Federal Constitution as shown in the judgments of the Supreme Court of Georgia.

In some instances in which the trial court committed Constitutional errors in its judgments and orders, first opportunity given petitioner to raise the federal question was in its enumeration of errors. In each case petitioner raised the question and insisted upon a ruling.

However, the Supreme Court of Georgia evaded decision on these questions by the illegal and unconstitutional device of holding that a later case controlled.

III.

CONSTITUTIONAL QUESTIONS HERE PRESENTED ARE SO UNUSUAL AND OF SUCH EXTRAORDINARY PUBLIC IMPORT THAT THEY DEMAND CONSIDERATION BY THIS COURT.

This Court in recent months has commendably strengthened the Constitutional provisions for free speech and a free press. However, we do not believe this Court is ready to hold that the theory of free press entitles a newspaper to take over the public streets for its private use to the exclusion of the public.

During the injunction hearing before the trial court on April 4, 1969 counsel for petitioner warned the court that if it persisted in its contention that abutting property owners had greater rights in the public streets than did the public the court would be in violation of federal constitutional provisions that the interest of the public in the streets overrides the interest of abutting owners.

In the same hearing counsel for petitioner urged vigorously that a judgment adverse to peti-

tioner would deprive petitioner without due process of its property in the form of unimpeded access to its place of business over the public streets and would be in violation of Article I Section I Paragraphs II, III, IV, XXIII, and Section III Paragraph I of the Georgia Constitution, and Section I of the Fourteenth Amendment of the U. S. Constitution.

JUDGMENT OF TRIAL COURT IS CAPRICIOUS AND ARBITRARY

However, at the conclusion of the hearing the trial court did capriciously and arbitrarily hand down judgments and orders dismissing petitioner's complaint and giving as a reason the fact that petitioner was not an abutting landowner. (Petitioner's appendix Pages 34,35,36). See in this connection Error No. 110 (R71).

At the conclusion of a motion hearing in the trial court May 13, 1970 counsel for petitioner insisted vigorously to the trial court that any ruling or judgment the court might reach which

would deprive petitioner of a review in the appellate courts would be in violation of Article I Section I Paragraphs II, III, IV, XXIII, and Section III Paragraph I of the Georgia Constitution and Section I of the Fourteenth Amendment of the U. S. Constitution.

RESPONDENTS AND THE GEORGIA COURTS SAID PETITIONER CAUSED THE DELAY IN APPEAL WHEN THE REPORTER "LOST" ALL THE DOCUMENTARY EVIDENCE CAUSING DELAY, AND "FOUND" IT MORE THAN A YEAR LATER: THIS IS UNCONTROVERTED EVIDENCE.

Counsel for petitioner argued before the trial court that any judgment of the trial court holding that the delay in filing the transcript was caused by petitioner would be contrary to direct, positive and uncontroverted evidence before the court and would deprive petitioner of its property without due process and without equal protection of the law granted to persons and to parties litigant in like circumstances and similar situations in violation of Article I Section I Paragraphs I, II,

III, IV, XXIII and XXV of the Georgia Constitution and Section I of the Amendment Fourteen of the U. S. Constitution. See in this connection Error No. 110 (R71).

Thereafter on May 20, 1970 the trial court rendered a judgment (petitioner's appendix, page 40) holding that the delay in filing the appeal was caused by petitioner, the judgment being based entirely on the equivocal, vague and self-contradictory testimony of the trial court's reporter and giving no weight to direct and positive testimony of the president of the petitioner.

This judgment of the trial court influenced the Supreme Court of Georgia to hold that petitioner's appeal was stale, thus denying petitioner a review in the state's highest tribunal. See in this connection Error No. 110 (R71)

THE TRIAL COURT'S OFFICIAL REPORTER FINALLY ADMITTED THAT HE FOUND THE MISSING EVIDENCE A YEAR AFTER THE TRIAL IN A CABINET IN THE PREMISES OF THE TRIAL COURT

The trial court's official reporter "misplaced"

all the documentary evidence (258 pages) at the close of the trial April 4, 1969 and did not find it until April 24, 1970, three weeks before the appeal was docketed in the Supreme Court of Georgia, thus delaying petitioner's appeal. See reporter's testimony and admissions at R22,23.

Evidence that neither the plaintiff nor its counsel was guilty of any delay or negligence in filing the transcript is at R24,25.

For additional facts on the nature of the official court reporter's testimony see petitioner's Appendix pages 17,18,19,20.

For authorities dealing with responsibilities of court reporters see petitioner's Appendix pages 26, 27, 28, 29, 30.

FEDERAL QUESTIONS RAISED

All of the Federal Constitutional questions raised in the trial court were raised and insisted upon in the Supreme Court of Georgia in petitioner's enumeration of errors, (R51,72) brief and argument,

and motions for rehearing. (Petitioner's Appendix Pages 9-31).

In a motion before the trial court May 13, 1970 petitioner argued the constitutional issue that the trial court had lost jurisdiction of the case because it already was docketed in the Supreme Court of Georgia. (Petitioner's appendix Pages 39,40).

The trial court thereafter arbitrarily dismissed petitioner's motion. (Petitioner's appendix Page 40).

RESPONDENTS' CASES CITED SUPPORT POSITION OF PETITIONER

Although petitioner raised ample Federal questions in trial court to justify jurisdiction of this Court, where obvious and flagrant violations of the Constitution appear in record this Court has considered such questions whether or not they had been formally raised in the trial court.

Respondents have cited and rely on several such cases. One of these is Williams v. Georgia 349 US 375 from an Atlanta trial court. The petitioner in that case did not raise a Constitutional question

until he applied for new trial in an extraordinary motion before the Georgia Supreme Court. But this Court accepted the case on certiorari.

In another case cited and relied on by respondents, Radio Station WOW Inc. v. Johnson 326 US 120, when the question of jurisdiction arose this Court held: "Federal question duly made below and we must consider it".

In another case cited and relied on by respondents, Street v. New York 394 US 576 the defendant had no stronger case as to jurisdiction than this petitioner, but his case was considered.

This Court's observation at the time was "Defendant was engaged in Constitutionally protected activity".

A motion in the trial court and raising of a Federal issue in two appellate courts was held sufficient to give this Court jurisdiction in that case.

In the case at bar petitioner presented a motion on Constitutional questions in the trial

court and insisted on the question before the Georgia Supreme Court. (R26,31,71)

Brief on Constitutional questions presented to the trial court by petitioner is in the record at R33,44.

RESPONDENTS OVERLOOK CONSTITUTIONAL LIMITATIONS IN THEIR AUTHORITIES

In their attempt to negate petitioner's right to an appeal, respondents have cited McKane v. Durston 153 US 684. McKane does say: "An appeal to a higher court from a judgment of conviction is not a matter of absolute right", but there follows this qualification applicable to the case at bar: "INDEPENDENTLY OF CONSTITUTIONAL PROVISIONS".

Thus McKane supports position of petitioner which is relying on Constitutional provisions.

In citing Tracy v. Ginzburg 205 US 170 to support their contention that "the Fourteenth Amendment did not impair a state's rights to take property", respondents overlooked the all-important qualification "WHEN THEY DO NOT INVOLVE ANY RIGHT SECURED

BY THE FEDERAL CONSTITUTION".

Petitioner relies on its property rights as secured by the Federal Constitution.

Respondents cite Baldwin v. Traveling Men's Association 283 US 522. The ruling in this authority is limited strictly to Federal courts. Baldwin points out, however, that the full faith and credit clause applies only to state courts.

Baldwin does not support any contention of respondents.

Sexton v. Barry 233 F 2d 220, cited by respondents, was a suit to enjoin a state supreme court from a pending proceeding. It has no application to the case at bar.

IV.

MOOTNESS AUTHORITIES CITED BY RESPONDENTS HAVE NO APPLICATION TO CASE AT BAR

Respondents had counted so heavily on mootness for their counter appeal that, although the Supreme Court of Georgia ignored the question, respondents are still arguing it in the presentation before this

Court.

When the court reporter "lost" the evidence they were given a convenient excuse to rush their building to completion and cry "moot".

Petitioner contends that their mootness argument now is itself moot.

It may be assumed that the Georgia Supreme Court agreed with the contention of petitioner that an obstruction in a street can never become moot, but may be removed by injunctive procedure at any time.

THE RESPONDENTS CONTEND THAT ONLY ABUTTING PROPERTY OWNERS CAN INTERVENE IN A CASE INVOLVING AN OBSTRUCTION IN THE STREET, AND THE GEORGIA SUPREME COURT IN EFFECT AFFIRMED IT CONTRARY TO LAW

Not one of the cases on mootness cited by respondents deals with an obstruction in a street, and therefore all their authorities are distinguished.

In Newman v. Smith 217 Ga. 475 the building sought to be enjoined was on private land.

In Sav-a-Stop Inc. v. Rich 224 Ga. 354 a con-

tractual relationship between the parties had terminated.

Trimble v. Connors 167 Ga. 52 deals with a highway being constructed across complainant's land.

Davison v. City of Summerville 204 Ga. 748 deals with a sewer line injunction.

Neither of those cases is applicable to the case at bar.

THE RESPONDENTS' NEW BUILDING ENCROACHES TO THE CENTER LINE OF WALL STREET FOR DISTANCE OF 810 FEET AND THE RESPONDENTS ADMIT IT

The new mechanical building of Atlanta Newspapers Inc. takes in half of Wall Street NW for a distance of 810 feet as found by the Fulton County surveyor in his survey and affidavit. (R1,2,3 and 4) This is real estate worth $1,000,000 on the present market.

Respondents admit the encroachment in their Brief (Page 5 Lines 6 and 23.) They prefer to call Wall Street "Seaboard Yard".

THE ENCROACHED AREA WAS USED BY THE PUBLIC AS A STREET FOR 75 YEARS, AND RESPONDENTS DO NOT DENY IT

This is a 25-foot strip to which a railroad, previous owner, had been given special privileges (loading zone for a freight depot and site for sidetracks) special privileges which were specifically limited to such uses as would not exclude the public.

The restrictions are spelled out in Seaboard Air Line Railway Co. v. Greenfield 160 Ga 407; 128 SE 430 on which respondents rely. This was a proceeding seeking to enjoin laying of sidetracks in the disputed area.

Petitioner insists that the special privileges granted for use as a common carrier do not justify a newspaper company in excluding the public and constructing a building on the disputed strip.

ALL ABUTTING OWNERS IN GEORGIA HAVE FEE TO HALF THE STREET BUT THEY ARE NOT PERMITTED TO OBSTRUCT THE STREET

Petitioner does not dispute that respondents own a fee interest in the site. Georgia law pro-

vides that the abutting owner has fee interest to half the street nearest him, but this does not permit the abutting owner to obstruct the street.

Despite the survey and affidavit of the Fulton County surveyor and despite their own photographs (R5) showing an original 50-foot street, respondents still claim that the encroachment is "not on a public street or highway". This claim, of course, is inconsistent with their admission that they have built on half of Seaboard Yard "sometimes called Upper Wall Street NW". (Respondents' Brief Page 5, Lines 6 and 23)

Respondents describe Wall Street NW and Fairlie Street NW as "alleged" streets. While their own photographs negate the implications of such "allegation", petitioner cites Greenfield (ante) for a description of Wall Street NW, then known as Seaboard Driveway, in which the Georgia Supreme Court held it was "one of the busiest highways in the City of Atlanta". (1925)

PENCIL-MARKED AFFIDAVIT IN RECORD SHOWS UNEQUAL TREATMENT BY TRIAL COURT

Petitioner cites as an example of unequal treatment under law by the trial court the Supplemental Affidavit of Boyd E. Taylor (R10,20).

The pencil marks on the document are the manuscript writing of the trial court.

No evidence offered by the respondents was thus mutilated by the trial court. In fact, not one single item of evidence of the respondents was stricken.

Petitioner contends that the trial court's rulings as shown by this affidavit violated nearly every constitutional right of petitioner including free speech.

Attention of the Court is called to two photographic exhibits of respondents (R5). The upper photograph (Exhibit C) shows Wall Street as it appeared for 75 years preceding the present construction. At right is the Seaboard freight depot. In connection with its common carrier activities the courts permitted the railroad special privileges in the street for loading docks and sidetracks AS LONG AS

THE PUBLIC WAS NOT EXCLUDED. Respondents have stretched these special privileges and argue they have a right to exclude the public and erect a permanent building on the disputed strip.

OBSTRUCTING BUILDING REDUCES 80-FOOT STREET TO WIDTH OF AN ALLEY

By sighting the depot building line toward the structure in the background the encroachment appears obvious. A few feet of the excavated area was backfilled when construction was completed, but the finished project left half the street taken permanently, an outrageous obstruction in the street. Hall Street now appears to be an alley.

Plaintiff's photographic exhibits (#6,7,8,9) bear captions which are self explanatory. They relate to the Fairlie Street relocation, which petitioner contends is unconstitutional, in that it is a public street being relocated for private convenience, to fit the building plans of respondents.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the writ for certiorari should be allowed.

Respectfully submitted,

G. Seals Aiken
Attorney for Petitioner
1400-10 Candler Building
Atlanta, Ga. 30303

CERTIFICATE OF SERVICE

The undersigned attorney for Petitioner hereby certifies that at least three copies of the foregoing Reply Brief of Petitioner Southland Incorporated in rebuttal of the Brief of Respondents Cox Enterprises Inc., and Atlanta Newspapers Inc., in support of Petitioner's Petition for Writ of Certiorari have been served upon Counsel of Record for all the Respondents by depositing the same in a United States mail box, with first class postage prepaid, respectively addressed to such Counsel of Record at their post office addresses, as follows:

Allen Post, Esq.
3300 First National Bank Tower
Atlanta, Georgia 30303
Counsel for Atlanta Newspapers
and Cox Enterprises Inc., Respondents

Henry L. Bowden and
Martin McFarland Esqs.
William-Oliver Building
Atlanta, Georgia 30303
Attorneys for Respondent City of Atlanta

J. L. Glover Esq.
Glover and Davis
Post Office Drawer 1038
Newnan, Georgia 30263
Attorney for Respondent Batson-Cook Co.

This _____ day of March, 1971

G. Seals Aiken
Counsel for Petitioner
Southland Incorporated